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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-452

CITY OF TOPEKA, KANSAS,
CITY OF TOPEKA STREET DEPARTMENT,
Petitioner,

vs.

THE KANSAS COMMISSION ON CIVIL RIGHTS,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CHARLES S. SCOTT, Attorney
Kansas Commission on Civil Rights
1155W State Office Building
Topeka, Kansas 66612

DAVID L. RYAN
Attorney at Law
209 Washburn Law School Building
Topeka, Kansas 66621

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-3030

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No. 73-_____

CITY OF TOPEKA, KANSAS,
CITY OF TOPEKA STREET DEPARTMENT,
Petitioner,

vs.

THE KANSAS COMMISSION ON CIVIL RIGHTS,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, The Kansas Commission on Civil Rights, opposes the Petition for Writ of Certiorari filed herein by Petitioner, City of Topeka, Kansas, Street Department for the following reasons.

OPINIONS BELOW

The Petition for Writ of Certiorari correctly identifies relevant proceedings and opinions below, except it fails to include the relevant pleading in Kansas district court concerning the Federal Constitutional issue.

JURISDICTION

This is a controversy concerning proper statutory construction of state law and procedure which involves no substantial federal question. Petitioner attempts to inflate state issues into federal issues under a Fourteenth Amendment due process theory.

As a municipal corporation, Petitioner has no standing to bring a federal action against the State of Kansas from which Petitioner's authority derives (*Baker* v. *Carr*, 369 U.S. 186, 289 (Frankfurter, J., dissenting) (1961); *Coleman* v. *Miller*, 307 U.S. 433, 441 (1939); *Williams* v. *Mayor*, 289 U.S. 36, 37 (1932); *Risty* v. *Chicago, R.I. & P. Ry. Co.*, 270 U.S. 378 (1925); *Pawhuska* v. *Pawhuska Oil Co.*, 250 U.S. 394, 399 (1918).). The state's legislative power to regulate petitioner absent the protection of the Fourteenth Amendment to the Constitution of the United States is traditionally unquestioned (*Trenton* v. *New Jersey*, 262 U.S. 182 (1922).).

QUESTION PRESENTED

Of first importance to Petitioner's "question" it must be noted that the Commission's administrative rule does not state (as Petitioner asserts) that "all denials" for rehearing will be acted on in writing. K.A.R. 21-22-17 provides: *"When* the commission denies an application for rehearing. . ." it will act in writing. The Supreme Court of the State of Kansas in its opinion in this matter, as cited by Petitioner (Petitioner's Appendix B, at 17 et seq.) clearly finds that only those denials which are affirmatively made before the ten (10) day statutory period for Commission action elapses require written notice because such action would commence the thirty (30) day time for appeal. If the Commission does not affirmatively act, the

time for appeal simply starts to run within ten (10) days from the date the rehearing application was filed.

It appears the real "question" is:

1. Whether the action of the Supreme Court of the State of Kansas affirming the lower court judgment holding the time for appeal from the Commission's order commences to run on the date which the Commission served its decisional order unless the Commission affirmatively acts on a petition for rehearing within ten (10) days in which case written notice is required, is consistent with the due process of law required of the Fourteenth Amendment to the Constitution of the United States.

STATUTES AND REGULATIONS INVOLVED

Kansas Statute, K.S.A. 44-1010, regarding rehearing and appeal:

> 44-1010. Rehearing, when; effect of order changing original decision. Any party being dissatisfied with any order or decision of the commission may, within ten (10) days from the date of the service of such order or decision, apply for a rehearing in respect to any matter determined therein; the application shall be granted or denied by the commission within ten (10) days from the date same shall be filed, *and if the rehearing be not granted within ten (10) days it shall be taken as denied.* If a rehearing be granted the matter shall be determined by the commission within thirty (30) days after the same shall be submitted. No cause of action arising out of any order or decision of the commission shall accrue in any court to any party unless such party shall make application

for a rehearing as herein provided. Such application shall set forth specifically the ground or grounds on which the applicant considers such order or decision to be unlawful or unreasonable. No party shall, in any court urge or rely upon any ground not set forth in said application. An order made after a rehearing abrogating, changing or modifying the original order or decision shall have the same force and effect as an original order or decision. (L. 1961, ch. 248 §7; June 30. Emphasis added to pertinent part.).

STATEMENT OF FACTS

The facts of the case are stated fully in the decision of the Kansas Supreme Court (Petitioner's Appendix B, at 19).

ARGUMENT

I.

Municipality Has No Standing to Raise the Alleged Constitutional Question in Federal Court.

This court has consistently refused to find that "the Federal Constitution restricts state power to design the structure of state political institutions." This policy is effected by denying standing to municipal corporations or their agencies (insofar as claims are made by the subdivisions themselves) seeking to challenge state action which may or may not infringe the interest of some separate unit within the state's administrative structure (*Baker* v. *Carr*, 369 U.S. 186, 289 (Frankfurter, J., dissenting) (1961).). Consequently, as a municipal corporation, Petitioner has no standing to bring a federal action against the State of Kansas from which Petitioner's authority derives (*Williams* v. *Mayor*, 289 U.S. 36, 37 (1932); *Pawhuska* v. *Pawhuska Oil Co.*, 250 U.S. 394, 399 (1918); *Trenton* v. *New Jersey*, 262 U.S. 182 (1922); *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1969).).

II.

Federal Issues Not Originally Presented or Fully Developed in Courts Below Will Not Be Considered in the Supreme Court of the United States.

It must be noted that Petitioner states the due process issue was *first raised* in the Supreme Court of the State of Kansas (Petitioner's Certiorari Petition, p. 6). Examination of Petitioner's district court pleadings show only a Sixth Amendment argument as selectively absorbed by the Fourteenth Amendment was alleged (See Respondent's Appendix A). This argument was not raised in the Su-

preme Court of the State of Kansas and no due process argument was included in Petitioner's Statement of Points relied on in the course of its appeal to the Kansas Supreme Court (See Respondent's Appendix B). Petitioner states the issue was first raised in the Supreme Court of the State of Kansas but it did not set out the issue in its "Statement of Points Relied On" in its appellate brief to that court. The Kansas Court repeatedly holds only issues affirmatively presented to and decided by the trial court will be considered on appeal (*National Van Lines Inc.* v. *Jones,* 192 Kan. 338, 388 P.2d 660 (1964); *Moore* v. *Starkey,* 185 Kan. 26, 340 P.2d 905 (1959); *Board of County Commissioners of Johnson County* v. *Brown,* 183 Kan. 19, 325 P.2d 382 (1958); *see* Kansas Supreme Court Rule No. 6, K.S.A. 60-2701.). This rule is in accord with Supreme Court of The United States Rule 23 (1) (f) (*Head* v. *New Mexico Board of Examiners in Optometry,* 374 U.S. 424 (1963); *Shelley* v. *Kraemer,* 334 U.S. 1 (1948); *CIO* v. *McAdory,* 325 U.S. 472, 477 (1944).).

This court has invoked the abstention doctrine in cases where there is "the susceptibility of a state statute of a construction by the state courts that would avoid or modify the constitutional question." (*England* v. *Louisiana Board of Medical Examiners,* 375 U.S. 411 (1964); *Zwickler* v. *Koota,* 389 U.S. 241 (1967); *see* Davis, Administrative Law Treatise §23.18 (1970 Supp.).). Petitioner has not originally presented, presumed or fully developed in lower courts the due process argument he now pleads. The instant "issue" is not properly raised for review by this Court.

III.

No Due Process Question Is Presented.

Assuming the issue had been properly raised, Petitioner would be in no better position. Petitioner's due process cases are not in point as they may be well distinguished on the simple fact that in those cases those agency rules are not inconsistent with relevant legislative authority, whereas in the instant case, the Kansas Commission on Civil Rights Rule in question, K.A.R. 21-22-17, would be inconsistent and in direct conflict with its underlying legislative authority, K.S.A. 44-1010, if it is interpreted as Petitioner's desire. The Kansas Supreme Court applies to the instant Commission rule complained of, K.A.R. 21-22-17, the universal rule of construction which requires agency rules to be interpreted in a manner consistent with state statutes. Rules cannot exceed the legislative authority conferred (*Wilcott* v. *Murphy*, 204 Kan. 640, 465 P.2d 959 (1970); *see also* Ryan and Carpenter, *Dubious Doctrines in Administrative Law*, 11 Washburn L.J. 351, 359 (1972).). In its decision, the Kansas Supreme Court utilizes the foregoing doctrine and finds the Kansas Commission on Civil Rights had not violated its rules *since it initiated no action which would require written notice.* Where the commission had not acted within ten (10) days, the Kansas statute, K.S.A. 44-1010, required Petitioner to initiate appeal within thirty (30) days. Ironically, Petitioner now complains of due process when in point of fact, Petitioner did not comply with the Kansas statute which is intended to facilitate due process by prohibiting post-hearing procedures which are protracted or unduly delayed.

CONCLUSION

The Petitioner has not presented a new or novel question for the Court to resolve, has not properly raised and preserved his due process question below, and lacks the requisite standing. The decision below does not deny due process. We request the petition for certiorari be denied.

Respectfully submitted,

KANSAS COMMISSION ON CIVIL RIGHTS
CHARLES S. SCOTT
Commission Attorney
Kansas Commission on Civil Rights
1155W State Office Building
Topeka, Kansas 66612
DAVID L. RYAN
Attorney at Law
209 Washburn Law School Building
Topeka, Kansas 66621

APPENDIX

APPENDIX A

PETITIONERS
KANSAS DISTRICT COURT APPEAL

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS

No. .....

On the complaints of ORIS TUNLEY, JR., VERNON STEELE, and HAROLD ROUNDTREE,
Complainants,

vs

THE CITY OF TOPEKA STREET DEPARTMENT,
Respondent,

vs

THE KANSAS COMMISSION ON CIVIL RIGHTS,
Third Party.

Amended Answer, Counterclaim, and Appeal from Final Order of Kansas Commission on Civil Rights

The City of Topeka, Kansas, a municipal corporation, and for its cause of action against the Kansas Commission on Civil Rights, does state and allege that:

1. On November 24 and 25, 1970, the Kansas Commission on Civil Rights held a hearing on the matters of the complaints of Oris Tunley, Jr., Vernon Steele and Harold Roundtree, complainants, for alleged unlawful

employment practices by the City of Topeka Street Department.

2. On March 20, 1971, the Commission rendered its Findings of Fact, Conclusions of Law, and Order against the Respondent City of Topeka Street Department, a copy of which is attached and marked Exhibit "A" and hereby incorporated by reference.

3. On March 26, 1971, the City of Topeka Street Department filed an Application for Rehearing on the Findings of Fact, Conclusions of Law, and Order entered by the Commission, a copy of which is attached, marked Exhibit "B" and hereby incorporated by reference.

4. The City of Topeka and through former Assistant City Attorney Bruce Harrington, on numerous occasions since the filing of the Application for Rehearing requested orally that it be permitted to orally argue the merits of the Application for Rehearing pursuant to Kansas Administrative Regulation 21-22-8 of the Kansas Commission on Civil Rights. See Exhibit "C", an affidavit to that effect, attached and hereby incorporated by reference.

5. On all occasions referred to in paragraph 4, the KANSAS Commission on Civil Rights summarily denied said requests.

6. The City of Topeka Street Department has been and still is waiting for an opportunity to be heard on the Application for Rehearing pursuant to K.A.R. 21-22-8 and the Sixth Amendment to the United States Constitution.

7. Until the Commission complies with its own rules and regulations and permits the City of Topeka Street Department to argue the merits of the Application for Rehearing, it is estopped from proceeding to enforce said Order entered with respect to the City of Topeka Street

Department, and the thirty (30) day appeal from the Commission to the District Court to obtain judicial relief pursuant to K.S.A. 44-1011 (1970 Supp.) is hereby tolled.

8. The Commission is bound by its Rules and Regulations promulgated pursuant to K.S.A. 44-1005 (1970 Supp.).

9. The provision of K.S.A. 44-1010 to the effect that:

> Any party being dissatisfied with any order or decision of the commission may, within ten (10) days from the date of the service of such order or decision, apply for a rehearing in respect to any matter determined therein; the application shall be granted or denied by the commission within ten (10) days from the date same shall be filed, and if the rehearing be not granted within ten (10) days it shall be taken as denied...

are unconstitutional and void as contrary to the Sixth Amendment to the United States Constitution in that the pertinent part ". . . and if the rehearing be not granted within ten (10) days it shall be taken as denied" denies the Respondent to the right to be heard pursuant to said constitutional provision as selectively absorbed by the Fourteenth Amendment to the United States Constitution.

10. The Commission, by and through Assistant Attorney General of Kansas, Jack N. Williams, filed a *Petition for Enforcement of Final Order* in the District Court of Shawnee County, Kansas, on June 4, 1971.

11. Said act of the Commission was arbitrary, capricious, and oppressive and should be enjoined.

12. The City of Topeka hereby incorporates by reference the statements and allegations found in the original ANSWER filed in the original captioned case.

13. Pursuant to K.S.A. 44-1011 (1970 Supp.) the City of Topeka demands judicial review of the Order of the Kansas Commission on Civil Rights, and that the action of the Commission be set aside for the reasons set out in the Application for Rehearing, attached and marked Exhibit "B".

WHEREFORE, the City of Topeka prays that the Commission be enjoined from enforcing its Order in the above-captioned matter until such a time as the Commission permits the City to exercise its right to be heard with respect to the Application for Rehearing. The City prays that the Court declare K.S.A. 44-1010 unconstitutional and void in that it is contrary to the Sixth and Fourteenth Amendments to the United States Constitution. The City prays that the Court determine that the appeal statute be tolled until such time as the Commission complies with its own Rules and Regulations and that the City be permitted to Appeal the Order of the Commission for judicial review to set aside pursuant to K.S.A. 44-1011 (1970 Supp.). The City also requests its costs in the above action and such other relief as the Court deems just and equitable.

City of Topeka, Kansas
By Edwin P. Carpenter
Assistant City Attorney
215 E. 7th
Topeka, Kansas
Attorney for the Respondent

[Exhibits A, B & C omitted here.]

APPENDIX B

PETITIONERS STATEMENT OF POINTS ON APPEAL TO THE KANSAS SUPREME COURT

Statement of Points Relied On

I

The district court erred in ruling that the Civil Rights Commission was not required to give the Respondent an opportunity to orally argue its Application for Rehearing pursuant to K.A.R. 21-22-8.

II

The district court erred in ruling that the Civil Rights Commission was not required to give the Respondent notice in writing when it denies an Application for Rehearing, pursuant to K.A.R. 21-22-17.

III

The district court erred in ruling that the statute of limitations of thirty (30) days, pursuant to K.S.A. 44-1010, was not tolled by the Commission on Civil Rights failure to follow its own Rules and Regulations and that the Notice of Appeal of the Respondent was void.

IV

The district court erred in ruling that KAR 21-22-17 was consistent with K.S.A. 44-1010 construing "shall" in the KAR to mean "may."